

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA)
 A municipal corporation)
 1200 First St., N.E., 5th Floor)
 Washington, DC 20002)
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 Plaintiff,)
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 v.)
)
 Potomac Electric Power Company)
 701 Ninth Street, N.W.)
 Washington, DC 20068)
)
 Pepco Energy Services, Inc.)
 701 Ninth Street, N.W.)
 Washington, DC 20068)
)
 Defendants.)
)

Civil Action No. 1:11-cv-00282 (BAH)

**JOINT STATUS REPORT AND REQUEST FOR EXTENSION OF DEADLINE FOR
 FINAL FEASIBILITY REPORT**

The parties submit the following joint status report and request for a six month extension of the current deadline for completion of the final Feasibility Study at the Benning Service Center site and adjacent portion of the Anacostia River:

Procedural History

On December 1, 2011, the Court entered a Consent Decree between Plaintiff District of Columbia (the “District”), acting by and through the District of Columbia Department of Energy and Environment (“DOEE”), and Defendants Potomac Electric Power Company and Pepco Energy Services, Inc. (collectively, “Pepco” and together with DOEE, the “Parties”). Electronic Case File (“ECF”) No. 32. The Consent Decree obligated Pepco to perform a Remedial

Investigation/Feasibility Study (“RI/FS”) at the Benning Service Center site at 3400 Benning Road NE, Washington, D.C., and a nearby portion of the Anacostia River (the “Site”).

On February 3, 2021, the Parties submitted a joint status report to the Court regarding their progress on the RI/FS. ECF No. 58. In that report, the Parties advised that Pepco was continuing work on the Treatability Study to evaluate the effectiveness of certain remedial technologies to address contaminated sediments within a cove of the Anacostia River located within the Waterside Investigation Area of the Site (the “Cove”). At that time, Pepco’s contractor, AECOM, had completed all the field work initially planned for the Treatability Study with the exception of certain long-term data collection activities that were anticipated to extend beyond the completion of the Treatability Study report. The parties further advised the Court about a COVID-related delay in completing one critical element of the Treatability Study – a sequestration study being conducted by Dr. Upal Ghosh at the University of Maryland Baltimore County to evaluate the effectiveness of amending capping materials with three different carbon/treatment additives in reducing the bioavailability of polychlorinated biphenyls (“PCBs”) in river sediment. In response to the Parties’ request, the Court extended the deadline for completion of the final Feasibility Study report to March 16, 2022, to allow time to complete the sequestration study and the subsequent elements of the Feasibility Study. Minute Order (Feb. 3, 2021). The Court’s Minute Order also directed the parties to submit their next joint status report by August 3, 2021. *Id.* This report is submitted in compliance with that Minute Order.

Status of RI/FS Activities Since February 3, 2021 Joint Status Report

Since the last status report, AECOM has completed the Treatability Study, except for certain supplemental monitoring to address newly available information about sources of discharge to the Cove. On February 26, 2021, in accordance with the timeline specified in the

last status report, Pepco submitted a revised draft Treatability Study report to DOEE, which included the findings received as of that date from the sequestration study. On March 22, 2021, DOEE provided comments on the draft Treatability Study. On April 16, 2021, Pepco submitted a further revised version of the Treatability Study which responded to DOEE's comments and incorporated the full findings from the final report of the sequestration study which was submitted by Dr. Ghosh on April 6, 2021. On April 27, 2021, DOEE provided additional information regarding discharges to the Cove from other potential sources. On May 5, 2021, representatives from Pepco and DOEE held a call to discuss this additional information and its implications for the Treatability Study. On May 11, 2021, DOEE advised Pepco of its approval of the Treatability Study report, with the understanding that Pepco would submit a further revised version of the report to reflect the additional information regarding discharges to the Cove. On May 20, 2021, representatives from Pepco and DOEE conducted a walking tour to investigate the location of other potential discharge points to the Cove. At the conclusion of this site walk, the Parties agreed that Pepco would prepare a plan for supplemental sampling to evaluate the sources, nature and extent of these other potential discharges to the Cove. In the meantime, Pepco submitted a final version of the Treatability Study on July 6, 2021, incorporating all currently available information. Pepco will submit an addendum to the Treatability Study to document the findings from the supplemental sampling.

AECOM also has completed the field work for a supplemental evaluation of perchloroethylene ("PCE") detected in groundwater in the south and southwest areas of Pepco's Benning facility. This evaluation is intended to investigate further the potential sources of PCE in groundwater, on the south side of Benning Road across from the Pepco property. The field work involved installation and sampling of temporary wells on both on-site and off-site areas to

measure contaminant concentrations and water levels and assess localized groundwater flow patterns. Following receipt of all permits required for this work, AECOM installed a total of 15 wells between March 2 and March 10, 2021. The wells were sampled between March 15 and April 2, 2021, and a second round of water level measurements was conducted on July 7, 2021. AECOM is currently evaluating the sampling data and will be preparing a technical memorandum for submission to DOEE documenting the results of the supplemental evaluation.

In addition to work on the Treatability Study and the PCE groundwater evaluation, Pepco has been proceeding with the remaining work required to complete the Feasibility Study. In particular, Pepco has been identifying and evaluating remedial alternatives to address conditions identified in the Remedial Investigation as posing actionable risk both on the landside at Pepco's Benning Road facility and in the Waterside Investigation Area. Remedial technologies under consideration to address contaminated sediments within the Cove include dredging and/or capping, as well as amendments to capping materials designed to sequester PCBs. The purpose of these remedial technologies is to prevent risks to human health and the environment from exposure to contaminated sediment, consistent with the objectives of the RI/FS and the requirements of the Consent Decree. In addition, Pepco has proposed the possibility of combining these remedial actions with the construction of ecological enhancements within the Cove, such as a tidal marsh, that would provide higher quality habitat and present a more attractive appearance than the currently existing mud flat.

Both the D.C. Brownfield Revitalization Act and the federal Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") impose liability on responsible parties for damages to natural resources. *See* D.C. Code § 8-632.01(b)(4); 42 U.S.C. § 9607(a)(4)(C). The responsibility for assessing and seeking compensation for damages to

natural resources under public control is assigned under CERCLA to appropriate public entities who act as “trustees” for the public resources in question. 42 U.S.C. § 107(f). For the Anacostia River, the natural resource trustees include the District, the National Park Service, the U.S. Fish and Wildlife Service, and the National Oceanic and Atmospheric Administration. These agencies have formed a Trustee Council to coordinate their activities and recently began the process of assessing the nature and extent of natural resource damages resulting from the contamination of the river. Once the damages have been assessed and quantified, the Trustees will seek compensation from responsible parties, which could include performing ecological restoration projects identified by the Trustees as appropriate.

The process of assessing and compensating for natural resource damages is separate from and, in practice, usually follows the completion of remedial response actions. However, the remedial actions being considered for the Cove present a unique and valuable opportunity to integrate remedial action and resource restoration because the ecological enhancement would take place in the same physical location as the cleanup actions. Integrating the restoration work with the remedial action in the Cove would accelerate the timeline for completing the restoration work, could result in significant construction efficiencies and overall cost savings, and could minimize environmental impacts and public disruption associated with the construction work by avoiding multiple mobilizations. In contrast, conducting restoration as a separate project after the remedy has been implemented would likely require disturbance and reworking of a constructed cover system, which could involve duplication of effort and lead to short-term re-exposure of contaminated sediments. For these reasons, DOEE supports Pepco’s proposal to include restoration alternatives as part of its evaluation in the Feasibility Study, to create the opportunity for DOEE to select a remedy that would integrate restoration with cleanup.

Successfully integrating remedy and restoration requires close coordination between Pepco and the Trustees in two critical respects. First, the proposed restoration must be vetted by the Trustees (and other stakeholders, such as the local community) to ensure that it is appropriate and sufficient in nature and scale to compensate for damages to natural resources. Second, Pepco seeks reasonable assurance from the Trustees that it will receive appropriate credit against future natural resource damage claims for the additional efforts and costs associated with ecological enhancements.

Recognizing that the necessary coordination would take time, Pepco initiated communications with the Trustee Council in February of this year, and on March 11, 2021, made a written request to the Council for a meeting at which to present its proposal for possible integration of remedial and restoration work in the Cove. The Trustee Council held a meeting on June 26, 2021. During this meeting, Pepco presented its conceptual plan for integrating remedial and restoration work in the Cove, sought input from the Council on the kinds of restoration that would be most desirable and ecologically beneficial, and offered to enter into negotiations for a cooperative agreement that would help expedite the damage assessment process and provide a framework for crediting any early restoration work completed as part of the Cove remedy. While the Trustee Council expressed general support for an approach that would integrate restoration and remedial work in the Cove, it advised that it would not be in a position to discuss a cooperative agreement until the Trustees finalized the pre-assessment screening process for natural resource damages and provided notice to potentially responsible parties of their intention to proceed with the damage assessment.

Although no firm timeline has been provided, Pepco anticipates that the Trustee Council will be prepared to resume discussions by sometime this Fall. In the meantime, the Trustee

Council has asked Pepco to give a follow-up presentation to the Council's technical committee regarding the findings of Pepco's investigation of conditions within the Cove. That discussion is currently scheduled for August 9, 2021. In addition, on July 13, 2021, DOEE convened a meeting with Pepco and various DOEE officials involved in efforts to protect and enhance aquatic resources within the District. During this meeting, DOEE participants provided specific input on Pepco's proposal and shared ideas for the highest and best form of restoration for the Cove.

Request for Extension to Complete the Final Feasibility Study

While Pepco is making efforts to advance the approach of integrating remedy and restoration within the Cove, it is not in a position to complete a Feasibility Study that would include restoration alternatives by the current Court-approved deadline of March 26, 2022. Given the need for DOEE's technical review of the draft Feasibility Study report followed by the required public review and comment, the current schedule calls for Pepco to submit an initial draft of the Feasibility Study report by mid-September of 2021. Pepco needs additional input from the Trustees before it can develop restoration alternatives with sufficient level of detail required for a CERCLA-quality feasibility study.¹ For example, there are various aquatic habitat types that could be constructed in different combinations in different areas of the Cove having different hydrological characteristics, soil requirements, and plant types. The specifics of each alternative restoration project need to be defined before the feasibility, effectiveness, and costs for each alternative can be adequately evaluated. In addition, the Trustee Council has not yet

¹ Paragraph 8.c. of the Consent Decree specifies that the RI/FS shall be performed in accordance with the National Contingency Plan at 40 C.F.R. Part 300, which is a regulation issued by the U.S. Environmental Protection Agency to implement the response action requirements under CERCLA.

reached the stage of the natural resource damage assessment process where a discussion of crediting Pepco for its work is possible.

Given the significant benefits of an integrated approach with the Trustee Council and other stakeholders, the Parties respectfully request that the Court grant a six-month extension, to September 16, 2022, of the current deadline for completing the final Feasibility Study. Although such an extension may result in a corresponding delay to the commencement of remedial work in the Cove, it would create the opportunity to reach completion of the restoration phase substantially sooner than if restoration must be deferred to a separate process following the remedial work. A separate restoration project in the Cove would likely require at least several years to plan, permit, and implement.² The Parties further propose to submit the next status report to the Court by February 3, 2022, six months from the date of this status report.

Dated: August 3, 2021

Respectfully submitted,

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² In particular, addressing restoration in a separate phase following remediation likely would require a detailed environmental review under the National Environmental Policy Act (“NEPA”) that potentially could be avoided if the restoration were integrated into the remedy. If required, a full NEPA Environmental Impact Statement typically would require at least two years to complete.

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